

DONALD F. ZIMMER, JR. (State Bar No. 112279)  
KRISTA L. COSNER (State Bar No. 213338)  
DRINKER BIDDLE & REATH LLP  
50 Fremont Street, 20<sup>th</sup> Floor  
San Francisco, California 94105  
Telephone: (415) 591-7500  
Facsimile: (415) 591-7510

Attorneys for Defendants  
SMITHKLINE BEECHAM CORPORATION dba  
GLAXOSMITHKLINE and McKESSON  
CORPORATION

ORIGINAL  
FILED  
MAR 26 2008  
RICHARD W. WIERING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
MEJ

E-filing

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CAROLYN PRUITT as personal  
representative of JOHN T. PRUITT  
(deceased); CHARLOTTE MOYER as  
personal representative of LEO F. MOYER  
(deceased); and LOLA McCLINTOCK as  
personal representative of JAMES  
McCLINTOCK (deceased),

Plaintiffs,

v.

SMITHKLINE BEECHAM  
CORPORATION dba  
GLAXOSMITHKLINE; and McKESSON  
CORPORATION,

Defendants.

Case No.

**DECLARATION OF KRISTA L.  
COSNER IN SUPPORT OF NOTICE  
OF REMOVAL AND REMOVAL,  
UNDER 28 U.S.C. § 1441(B)  
(DIVERSITY) and 28 U.S.C. § 1441(C)  
(FEDERAL QUESTION) OF  
DEFENDANT SMITHKLINE  
BEECHAM CORPORATION dba  
GLAXOSMITHKLINE**

I, KRISTA L. COSNER, declare:

1. I am an attorney admitted to practice before all courts of the State of California and am an Associate with Drinker Biddle & Reath, LLP, attorneys for SMITHKLINE BEECHAM CORPORATION dba GLAXOSMITHKLINE ("GSK") and McKESSON CORPORATION ("McKesson") (collectively, "Defendants") in this action. I make this Declaration based on my personal knowledge, in support of Defendant GSK's removal of *Carolyn Pruitt, et al. v. GlaxoSmithKline, et al.*, San Francisco Superior Court

DRINKER BIDDLE & REATH LLP  
50 Fremont Street, 20th Floor  
San Francisco, CA 94105

1 Case Number CGC 08-472503, to this Court. I would and could competently testify to  
2 the matters stated in this Declaration if called as a witness.

3 2. A true and accurate copy of the Complaint in this action is attached as  
4 **Exhibit A.**

5 3. A true and accurate copy of the Defendants' Answer to the Complaint  
6 ("Answer") in this action is attached as **Exhibit B.** The Complaint and the Answer are  
7 the only state court pleadings known to Defendants to have been filed in this action.

8 4. A true and accurate copy of the Judicial Panel on Multidistrict Litigation's  
9 Transfer Order, *In re Avandia Marketing, Sales Practices and Products Liability*  
10 *Litigation*, MDL 1871 (E.D.P.A.) is attached as **Exhibit C.**

11 5. The Declaration of Greg Yonko In Support of Defendant's SmithKline  
12 Beecham's Notice of Removal and Removal Action Under 28 U.S.C. § 1441(b)  
13 (Diversity) and 28 U.S.C. § 1441(c) (Federal Question) of Defendant SmithKline  
14 Beecham Corporation dba GlaxoSmithKline in *Dorothy Bone et al., v. SmithKline*  
15 *Beecham Corp., et al.* is attached as **Exhibit D.**

16 6. This is one of many cases that have been filed recently in both federal and  
17 state courts across the country involving the prescription drug Avandia.

18 7. Plaintiffs' counsel, The Miller Firm, has filed Avandia cases in both state  
19 and federal courts, but only in the cases filed in California has The Miller Firm named  
20 McKesson or any distributor as a defendant.

21 8. GSK intends to seek the transfer of this action to that Multidistrict  
22 Litigation, *In re Avandia Marketing, Sales Practices and Products Liability Litigation*,  
23 MDL 1871, and shortly will provide the JPML with notice of this action pursuant to the  
24 procedure for "tag along" actions set forth in the rules of the JPML.

25 9. GSK is, and was at the time Plaintiffs commenced this action, a corporation  
26 organized under the laws of the Commonwealth of Pennsylvania with its principal place  
27 of business in Philadelphia, Pennsylvania, and therefore is a citizen of Pennsylvania for  
28 purposes of determining diversity.

1           10. GSK was served with the Complaint on February 28, 2008. McKesson was  
2 served with the Complaint on February 28, 2008.

3           I declare under penalty of perjury under the laws of the United States of America that  
4 the foregoing is true and correct. Executed on this 26th day of March, 2008 in San  
5 Francisco, California.

6  
7  
8  for  
KRISTA L. COSNER

# Exhibit A

**FILED**

Superior Court of California  
County of San Francisco

FILED 22 2008

DAVID C. ANDERSEN (State Bar No. 194095)  
THE MILLER FIRM, LLC  
108 Railroad Avenue  
Orange, VA 22960  
Telephone: (540) 672-4224  
Facsimile: (540) 672-3055  
Email: [dandersen@doctoratlaw.com](mailto:dandersen@doctoratlaw.com)

CASE MANAGEMENT CONFERENCE SET BY:

GORDON PARK LI, Clerk

Deputy Clerk

25 2008 - 9:00 AM

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

CAROLYN PRUITT AS  
PERSONAL REPRESENTATIVE  
OF  
JOHN T. PRUITT (DECEASED)

CHARLOTTE MOYER AS  
PERSONAL REPRESENTATIVE  
OF  
LEO F. MOYER (DECEASED)

LOLA McCLINTOCK AS  
PERSONAL REPRESENTATIVE  
OF  
JAMES McCLINTOCK  
(DECEASED)

Plaintiffs

SMITHKLINE BEECHAM  
CORPORATION  
d/b/a GLAXOSMITHKLINE AND  
MCKESSON CORPORATION

Defendants

Case No. **0808-472503**

COMPLAINT FOR DAMAGES  
AND JURY DEMAND

BASED ON:

1. NEGLIGENCE
2. NEGLIGENT FAILURE TO ADEQUATELY WARN
3. NEGLIGENCE *PER SE*
4. NEGLIGENT MISREPRESENTATION
5. BREACH OF EXPRESS WARRANTY
6. BREACH OF IMPLIED WARRANTY
7. STRICT PRODUCTS LIABILITY DEFECTIVE DESIGN
8. STRICT PRODUCTS LIABILITY MANUFACTURING AND DESIGN DEFECT
9. STRICT PRODUCTS LIABILITY FAILURE TO ADEQUATELY WARN
10. FRAUDULENT MISREPRESENTATION
11. VIOLATIONS OF CALIFORNIA and UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW
12. UNJUST ENRICHMENT
13. WRONGFUL DEATH
14. SURVIVAL ACTION
15. LOSS OF CONSORTIUM
16. PUNITIVE DAMAGES

1  
2  
3  
**COMPLAINT AND  
DEMAND FOR JURY TRIAL**

4 Plaintiffs, individually and as representatives of the decedents' estates, by attorneys, THE  
5 MILLER FIRM, LLC, as and for the Complaint herein allege upon information and belief the  
6 following:

7  
8  
**INTRODUCTION**

9 1. Plaintiffs' decedents are all individuals who have consumed Defendant  
10 SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE'S drug Avandia®.

11 2. This is an action to recover damages for personal injuries sustained by the Plaintiffs'  
12 decedents as the direct and proximate result of the wrongful conduct of the Defendants,  
13 SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE, (hereinafter referred  
14 to as "GSK") and MCKESSON CORPORATION (hereinafter referred to as "McKesson") in  
15 connection with the designing, developing, manufacturing, distributing, labeling, advertising,  
16 marketing, promoting, and selling of the widely-used diabetes prescription drug Avandia  
(rosiglitazone).

17 3. Defendant GSK designed, researched, manufactured, advertised, promoted,  
18 marketed, sold, and/or distributed Avandia.

19 4. Defendant McKesson is a corporation whose principal place of business is San  
20 Francisco, California. McKesson distributed and sold Avandia in and throughout the State of  
21 California.

22  
**JURISDICTION AND VENUE**

23 5. The California Superior Court has jurisdiction over this action pursuant to California  
24 Constitution Article VI, Section 10, which grants the Superior Court "original jurisdiction in all

1 causes except those given by statute to other trial courts." The Statutes under which this action is  
2 brought do not specify any other basis for jurisdiction.

3 6. The California Superior Court has jurisdiction over the Defendants because, based  
4 on information and belief, each is a corporation and/or entity organized under the laws of the State  
5 of California, a foreign corporation or association authorized to do business in California and  
6 registered with the California Secretary of State or has sufficient minimum contacts in California, or  
7 otherwise intentionally avails itself of the California market so as to render the exercise of  
8 jurisdiction over it by the California courts consistent with traditional notions of fair play and  
9 substantial justice.

10 7. Venue is proper in this Court pursuant to California Code of Civil Procedure Section  
11 395 in that Defendant McKesson has its principal place of business in San Francisco.

12 8. Furthermore Defendants GSK and McKesson have purposefully availed themselves  
13 of the benefits and the protections of the laws within the State of California. Defendant McKesson  
14 has its principal place of business within the state. Defendants GSK and McKesson have had  
15 sufficient contact such that the exercise of jurisdiction would be consistent with the traditional  
16 notions of fair play and substantial justice.

17 9. Plaintiffs seek relief that is within the jurisdictional limits of the Court.

18 **PARTY PLAINTIFFS**

19 10. The Plaintiff Carolyn Pruitt, surviving spouse of decedent John T. Pruitt, is a natural  
20 person and a resident of the State of Illinois.

21 11. The Plaintiff Charlotte F Moyer, surviving spouse of decedent Leo F. Moyer, is a  
22 natural person and a resident of the State of California.



12. The Plaintiff Lola McClintock, surviving spouse of decedent James McClintock, is a natural person and a resident of the State of California.

**PARTY DEFENDANTS**

13. The Defendant, SmithKline Beecham Corporation d/b/a Glaxosmithkline, is a Pennsylvania corporation which has its principal place of business at One Franklin Plaza, 200 N. 16<sup>th</sup> Street, Philadelphia, Pennsylvania 19102.

14. At all times material hereto, the Defendant, SmithKline Beecham Corporation d/b/a GlaxoSmithKline was engaged in the business of designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling, and/or selling Avandia.

15. Defendant GSK includes any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint ventures and organizational units of any kind, their predecessors, successors and assigns and their present officers, directors, employees, agents, representatives and other persons action on their behalf.

16. Plaintiffs' decedents are informed and believe, and based thereon allege, that in committing the acts alleged herein, each and every managing agent, agent, representative and/or employee of the defendant was working within the course and scope of said agency, representation and/or employment with the knowledge, consent, ratification, and authorization of the Defendant and its directors, officers and/or managing agents.

17. Upon information and belief, the Defendant, SmithKline Beecham Corporation d/b/a Glaxosmithkline, was formed as a result of the merger of pharmaceutical corporations Glaxo Wellcome, Inc., and SmithKline Beecham, Inc.

18. At all times material hereto, the Defendant, McKesson, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its



1 principal place of business in San Francisco, California. McKesson is, and at all times material to  
2 this action was, authorized to do business, and was engaged in substantial commerce and business  
3 under the laws of the State of California.

4 19. Defendant McKesson includes any and all parents, subsidiaries, affiliates, divisions,  
5 franchises, partners, joint ventures and organizational units of any kind, their predecessors,  
6 successors and assigns and their present officers, directors, employees, agents, representatives and  
7 other persons action on their behalf.

8 20. Plaintiffs' decedents are informed and believe, and based thereon allege, that in  
9 committing the acts alleged herein, each and every managing agent, agent, representative and/or  
10 employee of the defendant was working within the course and scope of said agency, representation  
11 and/or employment with the knowledge, consent, ratification, and authorization of the Defendant  
12 and its directors, officers and/or managing agents.

13 21. At all times relevant to this action, Defendant McKesson packaged, distributed,  
14 supplied, sold, placed into the stream of commerce, labeled, described, marketed, advertised,  
15 promoted, and purported to warn or to inform users regarding the risks pertaining to, and assuaged  
16 concerns about the pharmaceutical Avandia.

17 **BACKGROUND**  
18 **STATEMENT OF THE CASE**

19 22. Type 2 diabetes is the most common form of diabetes, afflicting 18 million  
20 Americans and 200 million people worldwide. This form of diabetes occurs when the body does  
21 not make enough insulin (a hormone needed to convert sugar and other food into energy) or cannot  
22 effectively use what it manages to produce.

23 23. Avandia, created and marketed by GSK, is designed to treat persons with Type 2  
24 diabetes by helping sensitize cells to insulin, thereby greatly assisting in blood-sugar control. It also

1 is combined with metformin and sold as Advandamet. Only one other drug like it, pioglitazone,  
2 sold as Actos and Actoplus, made by Takeda Pharmaceuticals, is sold in the United States. In 2006,  
3 Avandia represented 37% of the U.S. market for oral diabetes treatments. Thus, the U.S. market for  
4 such drugs is huge, and Avandia faces only one competitor for that market.

5 24. Avandia had a total U.S. sales of \$2.2 billion in 2006, slightly less than the \$2.6  
6 billion in total U.S. sales for Actos, according to IMS Health, a healthcare information company.  
7 Approximately 13 million Avandia prescriptions were filled in the U.S. last year, with a one-month  
8 supply of Avandia selling for between \$90 and \$170. Avandia is critical to GSK, being the  
9 company's second largest selling drug after Advair (an asthma medication).

10 25. GSK's product Avandia can cause heart injury, excessive fluid retention, fluid-  
11 overload disease, liver damage, liver failure, stroke and severe injury to the heart leading to cardiac  
12 arrest and death. In 2005, GSK performed an overview analysis of multiple Avandia trials, referred  
13 to as a "meta-analysis", and shared the preliminary results with the Food and Drug Administration  
14 ("FDA") in September 2005. Almost one year later, in August 2006, a more complete version of  
15 the meta-analysis was provided to the FDA. The results of GSK's analysis showed that patients  
16 taking Avandia had a 31% higher risk of adverse cardiovascular events such as heart attack due to  
17 obstruction of blood flow.

18 26. GSK's Avandia can cause heart injury, excessive fluid retention, fluid-overload  
19 disease, liver damage, liver failure, stroke, and severe injury to the heart leading to cardiac arrest  
20 and death. Not only was GSK aware of the dangers posed by Avandia, but data from these studies  
21 continued to be made available to GSK. On May 21, 2007, Dr. Steven E. Nissen, a prominent  
22 cardiologist associated with the Cleveland Clinic, published a study in the New England Journal of  
23 Medicine of his analysis of 42 studies comprising of approximately 28,000 people who took

1 Avandia. These were on-line databases of GSK studies that were available on the Internet. Dr.  
2 Nissen's meta-analysis revealed a 43% higher risk of heart attack for those taking Avandia  
3 compared to people taking other diabetes drugs or no diabetes medication, and people taking  
4 Avandia suffered such adverse events at a rate of 1.99%, as opposed to 1.51% for other patients.  
5 Further, Dr. Nissen's analysis showed a 64% elevated risk of death from cardiovascular disease.

6 27. Despite GSK's longstanding knowledge of these dangers, Avandia's label only  
7 warns about possible heart failure and other heart problems when taken with insulin. GSK failed to  
8 adequately warn and disclose to consumers that Avandia significantly increased the risk of adverse  
9 cardiovascular events. Furthermore, the proper and effective use of Avandia by Plaintiffs'  
10 decedents was impaired due to GSK's failure to adequately warn of Avandia's defects and GSK's  
11 failure to properly and adequately set forth such warnings in Avandia's drug labeling.

12 28. GSK knew of these dangerous defects in Avandia from the many trials which it  
13 performed and to which it had access and from its own analysis of these studies, but took no action  
14 to adequately warn or remedy the defects, but instead concealed, suppressed and failed to disclose  
15 these dangers. Even in the face of Dr. Nissen's study, GSK continues to fail to warn of these  
16 dangers through revised drug labeling.

17 29. Not only has GSK failed to disclose in its labeling or advertising that Avandia is  
18 actually dangerous for diabetics, GSK has represented and has continued to represent that they  
19 manufacture and/or sell safe and dependable pharmaceuticals with safety as their first concern:

20 Like all innovative pharmaceutical companies, we carry out a series of clinical trials to test  
21 each investigational drug for the potential to become a new medicine.

22 \*\*\*

23  
24 Phase I trials typically involve health volunteers. *These trials study the safety of the drug*  
25 *and its interaction with the body*, for example, its concentration and duration in the blood following

1 various doses, and begin to answer such questions as whether the drug inhibits or amplifies the  
2 effects of other medicines that might be taken at the same time.

3  
4 Phase II studies enroll patients with the illness an investigational drug is designed to treat.  
5 These trials evaluate whether the drug shows favorable effects in treating an illness and seek to  
6 determine the proper dose. They provide an opportunity to explore the therapeutic potential of the  
7 drug in what may be quite different illnesses. *The evaluation of safety continues.*

8  
9 If Phase II results have been encouraging, Phase III trials, the largest part of a clinical-  
10 development program, go forward. *Phase III trials are designed to provide the substantial evidence*  
11 *of efficacy and safety required*, in addition to data from earlier-phase trials, before regulatory  
12 agencies will approve the investigational drug as a medicine and allow it to be marketed.

13  
14 <http://www.gsk.com/research/clinical/index/html> (emphasis supplied).

15  
16 30. GSK has also strongly touted their commitment to improving the quality of life: "We  
17 have a challenging and inspiring mission: to improve the quality of human life by enabling people  
18 to do more, feel better and live longer." <http://www.gsk.com/about/index.htm>.

19 31. On May 21, 2007, the FDA issued a Safety Alert on Avandia showing that there is a  
20 potentially significant risk of heart attack and heart-related deaths in patients taking Avandia.

21 32. Based on these representations, upon which both Plaintiffs' decedents and Plaintiffs'  
22 decedents' prescribing physicians relied, including the omission from the Avandia labeling of the  
23 danger of increased risk of adverse cardiovascular events as a result of ingesting Avandia,  
24 Plaintiffs' decedents purchased and ingested Avandia believing that the drug would be safe and  
25 effective.

26 33. In fact, however, Avandia poses significant safety risks due to defects in its chemical  
27 design and inadequate labeling.

28 34. To date, GSK has failed to adequately warn or inform consumers, such as Plaintiffs'  
29 decedents or Plaintiffs' decedents' prescribing physicians, of the known defects in Avandia that can  
30 lead to increased risks of cardiovascular events, including but not limited to heart injury, excessive

1 fluid retention, fluid-overload disease, liver damage, liver failure, stroke and severe injury to the  
2 heart leading to cardiac arrest, and death.

3 35. As a result of GSK's omissions and/or misrepresentations, Plaintiffs' decedents  
4 ingested Avandia, and have suffered heart injury, excessive fluid retention, fluid-overload disease,  
5 liver damage, liver failure, stroke, and severe injury to the heart leading to cardiac arrest and  
6 sustained physical and financial damages including pain and suffering.

7 36. Plaintiff John T. Pruitt (deceased) ingested Avandia from approximately January 13,  
8 2005 to March 5, 2006. Plaintiff John T. Pruitt died on March 5, 2006, of cardiac arrest and acute  
9 myocardial infarction.

10 37. Plaintiff Leo F. Moyer (deceased) ingested Avandia from approximately 1999 to  
11 March 21, 2006. Plaintiff Leo F. Moyer died on March 21, 2006, of heart attack.

12 38. Plaintiff James McClintock (deceased) ingested Avandia from approximately 2003  
13 to March 31, 2006. Plaintiff James McClintock died on March 31, 2006, of myocardial infarction.

14  
15 **COUNT I**  
16 **NEGLIGENCE**

17 (Against Defendants GSK and McKesson)

18  
19 39. Plaintiffs repeat and reiterate the allegations previously set forth herein.

20  
21 40. That at all times hereinafter mentioned, Defendants were under a duty to exercise  
22 reasonable care in the design manufacture, testing processing, marketing advertising, labeling,  
23 packaging distribution, and sale of Avandia, and Defendants knew or should have known that  
24 Avandia was not safe and that the user could sustain injuries and harm from the drug.

25 41. That Defendants GSK and McKesson negligently, recklessly, grossly negligently,  
26 wantonly and willfully displayed a morally culpable and conscious disregard of the rights of others

1 in that they failed to exercise reasonable care and failed to fulfill the above-stated duty by the  
2 manner that Defendants, directly and indirectly, advertised, marketed and promoted Avandia for the  
3 treatment of diabetes, even though Avandia, in fact, was not reasonably safe for such use, and  
4 furthermore, Defendants failed to adequately warn of the increased risk of serious cardiovascular  
5 events which Defendants knew or should have known about.

6 42. That Defendants GSK and McKesson negligently, recklessly, grossly negligently,  
7 wantonly and willfully displayed a morally culpable and conscious disregard of the rights of others  
8 by manufacturing, distributing, selling, advertising, marketing and promoting Avandia even though  
9 such drug was not safe or effective for any purpose because it caused serious cardiovascular events  
10 and by failing to adequately warn the trusting public and prescribing health care providers of the  
11 true, complete, and accurate risk and the lack of efficacy of Avandia.

12 43. The aforesaid incident and the injuries sustained by Plaintiffs' decedents were  
13 caused by or were contributed to by the negligence, recklessness, gross negligence, wantonness,  
14 willfulness, and conscious and callous disregard of the safety of the public, including Plaintiffs'  
15 decedents, on the part of Defendants in the design, manufacture, distribution, advertising, marketing  
16 and promoting of Avandia as being safe and effective in the treatment of diabetes, and by inducing  
17 the public, including Plaintiffs' decedents and Plaintiffs' decedents' prescribing physicians, to  
18 believe that Avandia was effective in the treatment of the causes and symptoms of diabetes.

19 44. Defendants GSK and McKesson failed to exercise reasonable care in the design,  
20 manufacture, testing, processing, marketing, advertising, labeling, packaging, rebranding,  
21 distribution and/or sale of Avandia in one or more of the following respects:

- 22 a. Designing, marketing, processing, advertising, packaging, distributing and/or selling a  
23 product that defendants knew, or should have known, carried the risk of serious; life-  
24 threatening side effects;  
25



- b. Failure to adequately test the product prior to placing the drug Avandia on the market;
- c. Failure to use care in designing, developing and manufacturing their product so as to avoid posing unnecessary health risks to users of such product;
- d. Failure to conduct adequate pre-clinical testing and post-marketing surveillance to determine the safety of Avandia;
- e. Failure to advise consumers, such as Plaintiffs, that consumption of Avandia could result in severe and disabling side effects, including but not limited to heart injury, excessive fluid retention, fluid-overload disease, liver damage, liver failure and severe injury to the heart leading to cardiac arrest and death.
- f. Failure to advise the medical and scientific communities of the potential for severe and disabling side effects, including but not limited to heart injury, excessive fluid retention, fluid-overload disease, liver damage, liver failure, and severe injury to the heart leading to cardiac arrest, and death.
- g. Failure to provide timely and/or adequate warnings about the potential health risks associated with the use of Avandia; and
- h. Any and all other acts of negligence with respect to Avandia which may be shown at trial.

45. That at all times hereinafter mentioned, upon information and belief, the above-described culpable conduct by Defendants GSK and McKesson was a proximate cause of injuries sustained by Plaintiffs' decedents.

46. That as a result of the aforesaid occurrence, the injuries sustained by Plaintiffs' decedents resulting therefrom, Plaintiffs' decedents suffered extensive monetary and pecuniary losses and other compensatory damages were also incurred and paid out including necessary medical, hospital, and concomitant expenses. In addition, Plaintiffs' decedents were deprived of a chance for safe and effective and/or successful treatment.

47. By reason of the foregoing, Plaintiffs' decedents sustained damages in a sum which exceeds the jurisdictional limits of all lower courts which would have jurisdiction of this matter, and



1 in addition, Plaintiffs seek punitive and exemplary damages against Defendants in an amount to be  
2 determined upon the trial of this matter.

3 48. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
4 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
5 relief as the Court deems proper.

6 **COUNT II**  
7 **NEGLIGENT FAILURE TO ADEQUATELY WARN**  
8 (Against Defendants GSK and McKesson)  
9

10 49. Plaintiffs repeat and reiterate the allegations previously set forth herein.

11 50. At all relevant times, defendants GSK and McKesson researched, developed,  
12 designed, tested, manufactured, inspected, labeled, and/or distributed, marketed, promoted, sold,  
13 and otherwise released into the stream of commerce the pharmaceutical, Avandia, and in the course  
14 of same, directly advertised or marketed the product to FDA, consumers or persons responsible for  
15 consumers, and therefore had a duty to warn of the risks associated with the use of Avandia.

16 51. At all relevant times, Avandia was under the exclusive control of the Defendants as  
17 aforesaid, and was unaccompanied by appropriate warnings regarding all possible adverse side  
18 effects and complications associated with the use of Avandia, dangerous drug-drug interactions and  
19 food-drug interactions, and the comparative severity, duration and the extent of the risk of injury  
20 with such use.

21 52. At all relevant times, defendants failed to timely and reasonably warn of material  
22 facts regarding the safety and efficacy of Avandia so that no reasonable medical care provider  
23 would have prescribed, or no consumer would have used, Avandia had those facts been made  
24 known to such providers and consumers.

1           53. At all relevant times, defendants failed to perform or otherwise facilitate adequate  
2 testing in that such testing would have shown that Avandia posed serious and potentially life-  
3 threatening side effects and complications with respect to which full and proper warning accurately  
4 and fully reflecting the symptoms, scope and severity should have been made to medical care  
5 providers, the FDA and the public, including Plaintiffs' decedents.

6           54. At all relevant times, Avandia, which was researched, developed, designed, tested,  
7 manufactured, inspected, labeled, distributed, marketed, promoted, sold, and otherwise released into  
8 the stream of commerce by Defendants, was defective due to inadequate post-marketing warning  
9 and/or instruction because, after Defendants knew or should have known of the risk of serious and  
10 potentially life-threatening side effects and complications from the use of Avandia, Defendants  
11 failed to provide adequate warnings to medical care providers, the FDA and the consuming public,  
12 including Plaintiffs, and continued to promote Avandia aggressively.

13           55. As a direct and proximate result of Defendants' carelessness and negligence, the  
14 Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents  
15 endured substantial pain and suffering and underwent extensive medical and surgical procedures.  
16 Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs'  
17 decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have  
18 suffered economic loss, and have otherwise been physically, emotionally and economically injured.  
19 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs  
20 seek actual and punitive damages from the Defendants as alleged herein.

21           56. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
22 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
23 relief as the Court deems proper.

**COUNT III**  
**NEGLIGENCE PER SE**

(Against Defendants GSK and McKesson)

57. Plaintiffs repeat and reiterate the allegations previously set forth herein.

58. At all times mentioned herein, Defendants GSK and McKesson had an obligation not to violate the law, in the manufacture, design, formulation, compounding, testing, production, processing, assembling, inspection, research, distribution, marketing, labeling, packaging preparation for use, sale and warning of the risks and dangers of the aforementioned product.

59. At all times herein mentioned, Defendants violated the Federal Food, Drug and Cosmetic Act, 21 U.S.C. Section 301 *et seq.*, related amendments and codes and federal regulations provided thereunder, and other applicable laws, statutes and regulations.

60. Plaintiffs' decedents, as purchasers and consumers of the product, are within the class of persons the statutes and regulations described above are designed to protect, and the injuries alleged herein are the type of harm these statutes are designed to prevent.

61. Defendants' acts constitute an adulteration and/or misunderstanding as defined by the Federal Food, Drug and Cosmetics Act, 21 U.S.C. § 331, and constitutes a breach of duty subjecting Defendants to civil liability for all damages arising therefrom, under theories of negligence *per se*.

62. Defendants failed to meet the standard of care set by the applicable statutes and regulations, which were intended for the benefit of individuals such as Plaintiffs' decedents, making Defendants negligent *per se*: (a) the labeling lacked adequate information on the use of the drug Avandia; (b) the labeling failed to provide adequate warnings of severe and disabling medical conditions as soon as there was reasonable evidence of their association with the drug; (c) there was inadequate information for patients for the safe and effective use of Defendants' drug; (d) there was

63. As a direct and proximate result of Defendants' carelessness and negligence, the Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents endured substantial pain and suffering and underwent extensive medical and surgical procedures. Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs' decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered economic loss, and have otherwise been physically, emotionally and economically injured. The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs seek actual and punitive damages from the Defendants as alleged herein.

11 64. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
12 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
13 relief as the Court deems proper.

**COUNT IV**  
**NEGLIGENT MISREPRESENTATION**  
(Against Defendants GSK and McKesson)

18 65. Plaintiffs repeat and reiterate the allegations previously set forth herein.

19           66. Defendants GSK and McKesson, in addition to knowing misrepresentations, made  
20 misrepresentations without any reasonable grounds for believing its statements to be true to  
21 Plaintiffs' decedents, other patients, and the medical community.

67. Defendants GSK and McKesson, through their misrepresentations, intended to induce justifiable reliance by Plaintiffs' decedents, other patients, and the medical community.



1           75. Defendants GSK and McKesson expressly represented to Plaintiffs' decedents and  
2 other consumers and the medical community that Avandia was safe and fit for its intended  
3 purposes, that is was of merchantable quality, that it did not produce any dangerous side effects, and  
4 that it was adequately tested.

5           76. Avandia does not conform to Defendants' express representations because it is not  
6 safe, has numerous and serious side effects, and causes severe and permanent injuries.

7           77. At all relevant times Avandia did not perform as safely as an ordinary consumer  
8 would expect, when used as intended or in a reasonably foreseeable manner.

9           78. Plaintiffs' decedents, other consumers, and the medical community relied upon  
10 Defendants' express warranties.

11           79. As a direct and proximate result of Defendants' breach of express warranty, the  
12 Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents  
13 endured substantial pain and suffering and underwent extensive medical and surgical procedures.  
14 Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs'  
15 decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have  
16 suffered economic loss, and have otherwise been physically, emotionally and economically injured.  
17 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs  
18 seek actual and punitive damages from the Defendants as alleged herein.

19           80. Defendants' conduct as described above was committed with knowing, conscious,  
20 wanton, willful, and deliberate disregard for the value of human life and the rights and safety of  
21 consumers such as Plaintiffs' decedents, thereby entitling Plaintiffs to punitive damages so as to  
22 punish them and deter it from similar conduct in the future.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

4  
5  
6

8

9  
10

11  
12  
13

14

15

16  
17

18  
19  
20

21

22

23  
24  
25



1 Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs'  
2 decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have  
3 suffered economic loss, and have otherwise been physically, emotionally and economically injured.  
4 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs  
5 seek actual and punitive damages from the Defendants as alleged herein.

6 90. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
7 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
8 relief as the Court deems proper.

9 **COUNT VII**  
10 **STRICT PRODUCTS LIABILITY - DEFECTIVE DESIGN**  
11 (Against Defendants GSK and McKesson)

12 91. Plaintiffs repeat and reiterate the allegations previously set forth herein.

13 92. At all times material to this action, the Defendants were responsible for designing,  
14 developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling, and/or  
15 selling Avandia.

16 93. The subject product is defective and unreasonably dangerous to consumers.

17 94. Avandia is defective in its design or formulation in that it is not reasonably fit,  
18 suitable, or safe for its intended purpose and/or its foreseeable risks exceed the benefits associated  
19 with its design and formulation.

20 95. At all times material to this action, Avandia was expected to reach, and did reach,  
21 consumers in this jurisdiction and through the United States, including the Plaintiffs' decedents  
22 herein, without substantial change in the condition in which it was sold.

23 96. At all times material to this action, Avandia was designed, developed, manufactured,  
24 tested, packaged, promoted, marketed, distributed, labeled, and/or sold by Defendants in a defective  
25

1 and unreasonably dangerous condition at the time it was placed in the stream of commerce in ways  
2 which include, but are not limited to, one or more of the following particulars:

3 a. When placed in the stream of commerce, Avandia contained unreasonably dangerous  
4 design defects and was not reasonably safe as intended to be used, subjecting the Plaintiffs'  
5 decedents to risks that exceeded the benefits of the subject product, including but not limited to the  
6 risks of developing heart injury, excessive fluid retention, fluid-overload disease, liver damage,  
7 liver failure, stroke and severe injury to the heart leading to cardiac arrest and death and other  
8 serious injuries and side effects in an unacceptably high number of its users;

9 b. When placed in the stream of commerce, Avandia was defective in design and  
10 formulation, making the use of Avandia more dangerous than an ordinary consumer would expect,  
11 and more dangerous than other risks associated with the other medications and similar drugs on the  
12 market for the treatment of diabetes;

13 c. The subject product's design defects existed before it left the control of the Defendants;

14 d. Avandia was insufficiently tested;

15 e. Avandia caused harmful side effects that outweighed any potential utility; and

16 f. Avandia was not accompanied by adequate instructions and/or warnings to fully apprise  
17 consumers, including the Plaintiffs' decedents herein, of the full nature and extent of the risks and  
18 side effects associated with its use, thereby rendering Defendants liable to Plaintiffs, individually  
19 and collectively.

20 97. In addition, at the time the subject product left the control of the Defendants, there  
21 were practical and feasible alternative designs that would have prevented and/or significantly  
22 reduced the risk of Plaintiffs' decedents' injuries without impairing the reasonably anticipated or  
23 intended function of the product. These safer alternative designs were economically and

1 technologically feasible, and would have prevented or significantly reduced the risk of Plaintiffs'  
2 decedents' injuries without substantially impairing the product's utility.

3 98. As a direct and proximate result of the subject product's defective design, the  
4 Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents  
5 endured substantial pain and suffering and underwent extensive medical and surgical procedures.  
6 Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs'  
7 decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have  
8 suffered economic loss, and have otherwise been physically, emotionally and economically injured.  
9 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs  
10 seek actual and punitive damages from the Defendants as alleged herein.

11 99. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
12 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
13 relief as the Court deems proper.

14 **COUNT VIII**  
15 **STRICT PRODUCTS LIABILITY – MANUFACTURING AND DESIGN DEFECT**  
16 **(Against Defendants GSK and McKesson)**

17  
18 100. Plaintiffs repeat and reiterate the allegations previously set forth herein.

19 101. At all times material to this action, Defendants were engaged in the business of  
20 designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing,  
21 labeling, and/or selling Avandia.

22 102. At all times material to this action, Avandia was expected to reach, and did reach,  
23 consumers in this jurisdiction and throughout the United States, including the Plaintiffs herein  
24 without substantial change in the condition in which it was sold.

1           103. At all times material to this action, Avandia was designed, developed, manufactured,  
2 tested, packaged, promoted, marketed, distributed, labeled, and/or sold by Defendants in a defective  
3 and unreasonably dangerous condition at the time it was placed in the stream of commerce in ways  
4 which include, but are not limited to, one or more of the following particulars:

5           a. When placed in the stream of commerce, Avandia contained manufacturing defects  
6 which rendered the product unreasonably dangerous;

7           b. The subject product's manufacturing defects occurred while the product was in the  
8 possession and control of the Defendants;

9           c. The subject product was not made in accordance with the Defendants' specifications and  
10 performance standards;

11           d. The subject product's manufacturing defects existed before it left the control of the  
12 Defendants;

13           104. As a direct and proximate result of the subject product's manufacturing defects, the  
14 Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents  
15 endured substantial pain and suffering and underwent extensive medical and surgical procedures.  
16 Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs'  
17 decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have  
18 suffered economic loss, and have otherwise been physically, emotionally and economically injured.  
19 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs  
20 seek actual and punitive damages from the Defendants as alleged herein.

21           105. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
22 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
23 relief as the Court deems proper.

**COUNT IX**

**STRICT PRODUCTS LIABILITY – FAILURE TO ADEQUATELY WARN**

(Against Defendants GSK and McKesson)

106. Plaintiffs repeat and reiterate the allegations previously set forth herein.

107. Avandia was defective and unreasonably dangerous when it left the possession of the Defendants in that it contained warnings insufficient to alert consumers, including the Plaintiffs' decedents herein, of the dangerous risks and reactions associated with the subject product, including but not limited to its propensity to cause heart injury, excessive fluid retention, fluid-overload disease, liver damage, liver failure, stroke and severe injury to the heart leading to cardiac arrest and death and other serious injuries and side effects over other forms of diabetes treatment.

108. The Plaintiffs' decedents were prescribed and used the subject product for its intended purpose.

109. The Plaintiffs' decedents could not have discovered any defect in the subject product through the exercise of reasonable care.

110. The Defendants GSK and McKesson, as manufacturers and/or distributors of the subject prescription product, are held to the level of knowledge of an expert in the field.

111. The warnings that were given by the Defendants GSK and McKesson were not accurate, clear and/or were ambiguous.

112. The warnings that were given by the Defendants GSK and McKesson failed to properly warn physicians of the increased risks of heart injury, excessive fluid retention, fluid-overload disease, liver damage, liver failure, stroke and severe injury to the heart leading to cardiac arrest and death and other serious injuries and side effects.

113. The warnings that were given by the Defendants GSK and McKesson failed to properly warn consumers of the increased risks of heart injury, excessive fluid retention, fluid-

1 overload disease, liver damage, liver failure, stroke and severe injury to the heart leading to cardiac  
2 arrest and death and other serious injuries and side effects.

3 114. The Plaintiffs' decedents, individually and through prescribing physicians,  
4 reasonably relied upon the skill, superior knowledge and judgment of the Defendants.

5 115. The Defendants GSK and McKesson had a continuing duty to adequately warn the  
6 Plaintiffs' decedents of the dangers associated with the subject product and of the poor efficacy of  
7 the product.

8 116. Had the Plaintiffs' decedents and/or Plaintiffs' decedents' prescribing physicians  
9 received adequate warnings regarding the risks, and the lack of benefits, of the subject product,  
10 Plaintiffs' decedents would not have used it.

11 117. As a proximate result of the subject product's manufacturing defects, the Plaintiffs'  
12 decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents endured  
13 substantial pain and suffering and underwent extensive medical and surgical procedures. Plaintiffs'  
14 decedents incurred significant expenses for medical care and treatment. Plaintiffs' decedents have  
15 lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered  
16 economic loss, and have otherwise been physically, emotionally and economically injured. The  
17 Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs seek  
18 actual and punitive damages from the Defendants as alleged herein.

19 118. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
20 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
21 relief as the Court deems proper.

22 **COUNT X**  
23 **FRAUDULENT MISREPRESENTATION**  
24 **(Against Defendants GSK and McKesson)**  
25

1 119. Plaintiffs repeat and reiterate the allegations previously set forth herein.

2 120. Defendants GSK and McKesson widely advertised and promoted Avandia as a safe  
3 and effective medication both in direct-to-consumer marketing and in fraudulent promotion to the  
4 health care providers including Plaintiffs' decedents prescribing physicians.

5 121. Defendants GSK and McKesson had a duty to disclose material information about  
6 serious side effects to consumers such as Plaintiffs. Additionally by virtue of Defendants' partial  
7 disclosures about the medication, in which Defendants touted Avandia as safe and effective  
8 treatment, Defendants had a duty to disclose all facts about the risks of use associated with the  
9 medication, including the potential for the medication to cause heart injury, excessive fluid  
10 retention, fluid-overload disease, liver damage, liver failure, stroke and severe injury to the heart  
11 leading to cardiac arrest, and death. Defendants intentionally failed to adequately disclose this  
12 information for the purpose of inducing consumers, such as Plaintiffs' decedents, to purchase  
13 Defendants' dangerous product.

14 122. Had Plaintiffs been aware of the hazards associated with Avandia, Plaintiffs'  
15 decedents would not have consumed the product that lead proximately to Plaintiffs' decedents'  
16 adverse health effects.

17 123. Defendants' advertisements regarding Avandia made material misrepresentations to  
18 the effect that Avandia was a safe and effective treatment, which misrepresentations Defendant  
19 knew to be false, for the purpose of fraudulently inducing consumers, such as Plaintiffs' decedents,  
20 to purchase such product. Plaintiffs' decedents relied in part on these material misrepresentations in  
21 deciding to purchase and consume Avandia to their detriment.

22 124. The damages sustained by Plaintiffs' decedents were a direct and foreseeable result  
23 of, and were proximately caused by Defendants' misrepresentations, concealment and omissions.



126. Any applicable statutes of limitation have been tolled by Defendants' knowing and active concealment and denial of the facts alleged herein. Plaintiffs' decedents and other members of the public who were prescribed and who ingested Avandia for the treatment of diabetes have been kept in ignorance of vital information essential to the pursuit of these claims, without any fault or lack of diligence on their part, and could not reasonably have discovered the fraudulent nature of Defendants' conduct, and information and documents concerning the safety and efficacy of Avandia. Furthermore, due to the aforesaid allegations, Plaintiffs' decedents may rely on the discovery rule in pursuit of this claim.

127. By reason of the foregoing, Plaintiffs' decedents sustained damages in a sum which exceeds the jurisdictional limits of all lower courts which would have jurisdiction of this matter, and in addition thereto, Plaintiffs seek punitive and exemplary damages against Defendants in an amount to be determined upon the trial of this matter.

128. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory, treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other relief as the Court deems proper.

**COUNT XI**  
**VIOLATIONS OF CALIFORNIA UNFAIR TRADE PRACTICES AND CONSUMER**  
**PROTECTION LAW**

(Against Defendants GSK and McKesson)

129. Plaintiffs repeat and reiterate the allegations previously set forth herein.

130. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Cal. Bus. & Prof. Code § 17200, et seq. and the Consumer Legal Remedies Act, Civ. Code § 1750 et seq. ("CLRA")

131. Defendants GSK and McKesson acted, used and employed deception, unfair and deceptive acts and practices, fraud, false promises, misrepresentations, concealment, suppression and omission of material facts with intent that physicians and medical providers rely upon such concealment, suppression and omission, and for the purpose of influencing and inducing physicians and medical providers to prescribe Avandia, for the treatment of diabetes to patients/consumers such as Plaintiffs' decedents, and causing such patients/consumers to purchase, acquire and use Avandia for the treatment of diabetes, as prescribed by their physicians and medical providers, in connection with the sale and advertisement of the drug Avandia, in violation of California law.

132. By reason of Defendants' acts, uses and employment of deception, unfair and deceptive acts and practices, fraud, false promises, misrepresentations, concealment, suppression and omission of material facts, reasonable patients/consumers acting reasonably, such as Plaintiffs' decedents, were caused to purchase and ingest Avandia, and thereby sustain serious personal injuries.

133. By reason of the foregoing, Plaintiffs sustained damages in a sum which exceeds the jurisdictional limits of all lower courts which would have jurisdiction of this matter, and in addition thereto, Plaintiffs seek punitive and exemplary damages against Defendants in an amount to be determined upon the trial of this matter.

## **COUNT XII**

### **UNJUST ENRICHMENT**

(Against Defendants GSK and McKesson)

134. Plaintiffs repeat and reiterate the allegations previously set forth herein.

136. Plaintiffs' decedents were injured by the cumulative and indivisible nature of the Defendants' conduct. The cumulative effect of the Defendants' conduct directed at physicians and consumers was to artificially create a demand for Avandia at an artificially inflated price. Each aspect of the Defendants' conduct combined to artificially create sales of Avandia.

137. The Defendants GSK and McKesson have unjustly benefited through the unlawful and/or wrongful collection of, inter alia, payments for Avandia and continue to so benefit to the detriment and at the expense of Plaintiffs.

11           138. Accordingly, Plaintiffs seek full disgorgement and restitution of the Defendants'  
12 enrichment, benefits, and ill-gotten gains acquired as a result of the unlawful and/or wrongful  
13 conduct alleged herein.

14           139. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
15   treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
16   relief as the Court deems proper.

**COUNT XIII**  
**WRONGFUL DEATH**  
(Against Defendants GSK and McKesson)

21 140. Plaintiffs repeat and reiterate the allegations previously set forth herein.

141. As a result of the acts and/or omissions of the Defendants as set forth herein,  
Plaintiffs' decedents suffered serious emotional and bodily injuries resulting in death.

1           142. Plaintiff Carolyn Pruitt, as decedent John T. Pruitt's surviving spouse, is entitled to  
2 recover damages, as decedent would have if he were living, as a result of the acts and/or omissions  
3 of the Defendants as specifically pled, herein pursuant to Cal. Code Civ. Proc. § 377.60.

4           143. Plaintiff Charlotte F. Moyer, as decedent Leo F. Moyer's surviving spouse, is  
5 entitled to recover damages, as decedent would have if he were living, as a result of the acts and/or  
6 omissions of the Defendants as specifically pled, herein pursuant to Cal. Code Civ. Proc. § 377.60.

7           144. Plaintiff Lola McClintock, as decedent James McClintock's surviving spouse, is  
8 entitled to recover damages, as decedent would have if he were living, as a result of the acts and/or  
9 omissions of the Defendants as specifically pled, herein pursuant to Cal. Code Civ. Proc. § 377.60.

10           145. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
11 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
12 relief as the Court deems proper.

13                                   **COUNT XIV**  
14                                   **SURVIVAL ACTION**  
15                                   (Against Defendants GSK and McKesson)

16  
17           146. Plaintiffs repeat and reiterate the allegations previously set forth herein.

18           147. As a result of the actions and inactions of the Defendants, Plaintiffs' decedents were  
19 caused harm and suffering before their death.

20           148. Plaintiffs in their own right and as personal representatives of the decedents' estates  
21 seek damages compensable under Cal. Code Civ. Proc. § 377.30.

22           149. Plaintiffs are potential beneficiaries of this action as surviving heirs, making them  
23 the decedents' successors in interest under Cal. Code Civ. Proc. § 377.30.

(Against Defendants GSK and McKesson)

151. Plaintiffs repeat and reiterate the allegations previously set forth herein.

152. In cases where Plaintiffs' decedents were married at the time of their respective injuries, the spouses of such Plaintiffs were entitled to their comfort, care, affection, companionship, services, society, advice, guidance, counsel, and consortium.

153. As a direct and proximate result of one or more of those wrongful acts or omissions of the Defendants described above, Plaintiffs' decedents' spouses have been and will be deprived of their comfort, care, affection, companionship, services, society, advice, guidance, counsel and consortium.

154. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory, treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other relief as the Court deems proper.

(Against Defendants GSK and McKesson)

155. Plaintiffs repeat and reiterate the allegations previously set forth herein.

156. At all times material hereto, the Defendants GSK and McKesson knew or should have known that the subject product was inherently more dangerous with respect to the risks of heart injury, excessive fluid retention, fluid-overload disease, liver damage, liver failure, stroke, and

1 severe injury to the heart leading to cardiac arrest, and death than alternative treatments for  
2 diabetes.

3 157. At all times material hereto, the Defendants GSK and McKesson attempted to  
4 misrepresent and did misrepresent facts concerning the safety of the subject product.

5 158. Defendants' misrepresentations included knowingly withholding material  
6 information from the medical community and the public, including the Plaintiffs' decedents herein,  
7 concerning the safety of the subject product.

8 159. At all times material hereto, the Defendants GSK and McKesson knew and  
9 recklessly disregarded the fact that Avandia causes debilitating and potentially lethal side effects  
10 with greater frequency than safer alternative methods of treatment for diabetes.

11 160. Notwithstanding the foregoing, the Defendants GSK and McKesson continued to  
12 aggressively market the subject product to consumers, including the Plaintiffs' decedents herein,  
13 without disclosing the aforesaid side effects when there were safer alternative methods of treatment  
14 for diabetes.

15 161. The Defendants GSK and McKesson knew of the subject product's defective and  
16 unreasonably dangerous nature, as set forth herein, but continued to design, develop, manufacture,  
17 market, distribute and sell it so as to maximize sales and profits at the expense of the health and  
18 safety of the public, including the Plaintiffs' decedents herein, in conscious and/or negligent  
19 disregard of the foreseeable harm caused by Avandia.

20 162. Defendants GSK and McKesson intentionally concealed and/or recklessly failed to  
21 disclose to the public, including the Plaintiffs' decedents herein, the potentially life threatening side  
22 effects of Avandia in order to ensure continued and increased sales.

1           163. The Defendants' intentional and/or reckless failure to disclose information deprived  
2 the Plaintiffs' decedents of necessary information to enable Plaintiffs' decedents to weigh the true  
3 risks of using the subject product against its benefits.

4           164. As a direct and proximate result of the Defendants' conscious and deliberate  
5 disregard for the rights and safety of consumers such as the Plaintiffs, the Plaintiffs' decedents  
6 suffered severe and permanent physical injuries. The Plaintiffs' decedents endured substantial pain  
7 and suffering and underwent extensive medical and surgical procedures. Plaintiffs' decedents  
8 incurred significant expenses for medical care and treatment. Plaintiffs' decedents have lost past  
9 earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered economic loss,  
10 and have otherwise been physically, emotionally and economically injured. The Plaintiffs' injuries  
11 and damages are permanent and will continue into the future. The Plaintiffs seek actual and  
12 punitive damages from the Defendants as alleged herein.

13           165. The aforesaid conduct of Defendants GSK and McKesson was committed with  
14 knowing, conscious, and deliberate disregard for the rights and safety of consumers, including the  
15 Plaintiffs' decedents herein, thereby entitling the Plaintiffs to punitive damages in an amount  
16 appropriate to punish the Defendants and deter them from similar conduct in the future.

17           166. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,  
18 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other  
19 relief as the Court deems proper.

20                           **PRAYER FOR RELIEF**

21           WHEREFORE, the Plaintiffs pray for judgment against Defendants as follows:

- 22           (1) Judgment for Plaintiffs and against defendants;
- 23           (2) Damages in the form of compensatory damages in excess of the jurisdictional limits,  
24           trebled on all applicable counts;



- (3) Physical pain and suffering of the Plaintiffs
- (4) Pre and post judgment interest at the lawful rate;
- (5) Reasonably attorneys' fees and costs and expert fees;
- (6) A trial by jury on all issues of the case;
- (7) For any other relief as this court may deem equitable and just;
- (8) Restitution of all purchase costs that Plaintiffs paid for Avandia disgorgement of Defendants' profits, and such other relief as provided by law;
- (9) Exemplary and punitive damages in an amount in excess of the jurisdictional limits, trebled on all applicable counts;
- (10) All Bill of Costs elements; and
- (11) Such other relief this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs demand a jury trial on all claims so triable in this action.

Dated: February 21, 2008

Respectfully submitted,



David C. Andersen (Bar No. 194095)

THE MILLER FIRM, LLC

Attorneys for Plaintiffs

108 Railroad Avenue

Orange, VA 22960

Phone: (540) 672-4224

Fax: (540) 672-3055

Email: dandersen@doctoratlaw.com

# Exhibit B

1 DONALD F. ZIMMER, JR. (State Bar No. 112279)  
2 KRISTA L. COSNER (State Bar No. 213338)  
3 DRINKER BIDDLE & REATH LLP  
4 50 Fremont Street, 20<sup>th</sup> Floor  
San Francisco, California 94105  
Telephone: (415) 591-7500  
Facsimile: (415) 591-7510

ENDORSED FILED  
SUPERIOR COURT  
COUNTY OF SAN FRANCISCO

MAR 2 9 2008

5 Attorneys for Defendants  
6 SMITHKLINE BEECHAM CORPORATION dba  
7 GLAXOSMITHKLINE and McKESSON  
CORPORATION

GORDON PARK-LI, CLERK

BY: \_\_\_\_\_  
Deputy Clerk

8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF SAN FRANCISCO

11 CAROLYN PRUITT as personal  
12 representative of JOHN T. PRUITT  
13 (deceased); CHARLOTTE MOYER as  
14 personal representative of LEO F. MOYER  
(deceased); and LOLA McCLINTOCK as  
personal representative of JAMES  
McCLINTOCK (deceased),

Case No. CV-08-472503

ANSWER TO COMPLAINT BY  
DEFENDANTS SMITHKLINE  
BEECHAM CORPORATION dba  
GLAXOSMITHKLINE; and  
McKESSON CORPORATION

15 Plaintiffs,

16 v.

17 SMITHKLINE BEECHAM  
18 CORPORATION dba  
GLAXOSMITHKLINE; and McKESSON  
CORPORATION,

19 Defendants.  
20  
21

22 INTRODUCTION

23 Defendants SMITHKLINE BEECHAM CORPORATION dba  
24 GLAXOSMITHKLINE ("GSK") and McKESSON CORPORATION ("McKesson")  
25 (collectively, the "Defendants"), by and through counsel, hereby respond to the  
26 allegations set forth by CAROLYN PRUITT, CHARLOTTE MOYER, and LOLA  
27 McCLINTOCK ("Plaintiffs") in THEIR Complaint for Damages (the "Complaint") as  
28 follows:

1 **GENERAL DENIAL**

2 By virtue of the provisions of California Code of Civil Procedure §431.30,  
3 Defendants generally deny each and every allegation in the unverified Complaint that  
4 relates to or is directed to Defendants or any of their alleged agents, servants or  
5 employees. Defendants further deny that Plaintiffs have been damaged to any extent or  
6 amount or is entitled to any relief whatsoever from Defendants.

7 Defendants additionally deny that there is any law, fact, theory or contractual or  
8 legal relationship under which Plaintiffs are entitled to damages in any amount by these  
9 answering Defendants.

10 Defendants further allege the following affirmative defenses to Plaintiffs'  
11 Complaint:

12 **AFFIRMATIVE DEFENSES**

13 **FIRST AFFIRMATIVE DEFENSE**

14 **(Improper Venue)**

15 Venue is improper.

16 **SECOND AFFIRMATIVE DEFENSE**

17 **(Insufficiency of Process and Insufficiency of Service of Process)**

18 Process and service of process are insufficient under California law.

19 **THIRD AFFIRMATIVE DEFENSE**

20 **(Failure to State a Claim)**

21 Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 **(Preemption/Primary Jurisdiction)**

24 Plaintiffs' claims are barred and/or this Court should defer this matter, in whole or  
25 in part, pursuant to the doctrine of primary jurisdiction, in that the FDA is charged under  
26 the law with regulating prescription drugs, including Avandia®, and is specifically  
27 charged with determining the content of the warnings and labeling for prescription drugs.  
28 The granting of the relief prayed for in the Plaintiffs' Complaint would impede, impair,

1 frustrate or burden the effectiveness of such federal law and would violate the Supremacy  
2 Clause (Art. VI, cl. 2) of the United States Constitution.

3 **FIFTH AFFIRMATIVE DEFENSE**

4 **(Statute of Limitations/Repose)**

5 Discovery may show that Plaintiffs' claims are barred, in whole or in part, by  
6 applicable statutes of limitations, statutes of repose, the doctrine of laches and/or as a  
7 result of the failure to allege and/or comply with conditions precedent to applicable  
8 periods of limitations and repose.

9 **SIXTH AFFIRMATIVE DEFENSE**

10 **(Assumption of Risk)**

11 Plaintiffs' decedents knowingly and voluntarily assumed any and all risks as to  
12 matters alleged in the Complaint, and such assumption of the risk bars in whole or in part  
13 the damages Plaintiffs seek to recover herein.

14 **SEVENTH AFFIRMATIVE DEFENSE**

15 **(Contributory/Comparative Negligence)**

16 At all times mentioned herein, Plaintiffs' decedents were negligent, careless, and  
17 at fault and conducted themselves so as to contribute substantially to any alleged risk of  
18 injuries and damages. Said negligence, carelessness and fault of Plaintiffs' decedents  
19 bars in whole or in part the damages which Plaintiffs seek to recover herein.

20 **EIGHTH AFFIRMATIVE DEFENSE**

21 **(Equitable Defenses)**

22 Plaintiffs' claims are barred by the doctrine of laches, estoppel, waiver, unclean  
23 hands and/or failure to preserve evidence.

24 **NINTH AFFIRMATIVE DEFENSE**

25 **(Improper Party Defendant)**

26 McKesson is not a proper party defendant to this action. McKesson was not  
27 involved with Avandia®, a product of GSK.

**TENTH AFFIRMATIVE DEFENSE**

**(Intervening, Superseding Cause)**

The damages allegedly sustained by Plaintiffs and/or Plaintiffs' decedents, if any, were not legally caused by Defendants, but instead were legally caused by intervening and superseding causes or circumstances.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Pre-existing Condition or Idiosyncratic Reaction)**

The risk of injuries, if any, resulted from a pre-existing and/or related medical condition and/or idiosyncratic reaction and not from any act or omission by or on behalf of Defendants.

**TWELFTH AFFIRMATIVE DEFENSE**

**(Fault of Others)**

Plaintiffs' and/or Plaintiffs' decedents alleged injuries, losses, or damages, if any, were caused by the actions negligence, carelessness, fault, strict liability, or omissions of third parties for which Defendants have no control or responsibility.

**THIRTEENTH AFFIRMATIVE DEFENSE**

**(Learned Intermediary)**

Plaintiffs' claims are barred in whole or in part by the learned-intermediary doctrine.

**FOURTEENTH AFFIRMATIVE DEFENSE**

**(Compliance with FDA Regulations)**

At all times relevant, the product was in accordance with and pursuant to all applicable statutes and regulations, including those of the Food and Drug Administration.

**FIFTEENTH AFFIRMATIVE DEFENSE**

**(Immunity for Prescription Drugs and Medical Devices)**

The Complaint and each cause of action thereof are barred by the doctrine of immunity for prescription drugs and medical devices, by the Commerce Clause, Article I, Section 8, of the Constitution of the United States as an undue burden upon interstate

1 commerce and/or by the preemption doctrine in that Plaintiffs have asserted claims for  
 2 relief which, if granted, would constitute an impermissible burden by this court on federal  
 3 laws, regulations and policy relating to the development and marketing of prescription  
 4 drugs and medical devices in violation of the Supremacy Clause, Article IV, Clause 2 of  
 5 the Constitution of the United States.

#### 6 SIXTEENTH AFFIRMATIVE DEFENSE

##### 7 (Restatements of Torts)

8 Defendants affirmatively plead the application of the Restatement (Second) of  
 9 Torts: Products Liability § 402A and comments thereto, and/or the Restatement (Third)  
 10 of Torts: Products Liability §§ 2, 4 and 6 and comments thereto. Adequate warnings and  
 11 complete warnings were provided to Plaintiffs' decedents' prescribing physician, and  
 12 therefore, the product was not defective or unreasonably dangerous.

#### 13 SEVENTEENTH AFFIRMATIVE DEFENSE

##### 14 (State of the Art)

15 At all times material hereto, Defendants' conduct and GSK's product, Avandia®,  
 16 conformed to the state of the art.

#### 17 EIGHTEENTH AFFIRMATIVE DEFENSE

##### 18 (Limitations on Punitive Damages)

19 With respect to Plaintiffs' demand for punitive or exemplary damages, Defendants  
 20 specifically incorporate by reference all standards of limitations regarding the  
 21 determination and enforceability of punitive damages awards, including but not limited  
 22 to, those standards of limitation which arose in *BMW of North America v. Gore*, 517 U.S.  
 23 559 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424  
 24 (2001), and *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003),  
 25 and *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007).

#### 26 NINETEENTH AFFIRMATIVE DEFENSE

##### 27 (Punitive and Exemplary Damages Not Proper)

28 Plaintiffs' claim for punitive damages violates, and it is therefore barred by, the



1 Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the  
2 United States of America on grounds including the following:

3 a. it is a violation of the Due Process and Equal Protection Clauses of the  
4 Fourteenth Amendment to the United States Constitution to impose punitive damages,  
5 which are penal in nature, against a civil defendant upon the Plaintiffs satisfying a burden  
6 of proof which is less than the "beyond a reasonable doubt" burden of proof required in  
7 criminal cases;

8 b. the procedures pursuant to which punitive damages are awarded may result  
9 in the award of joint and several judgments against multiple defendants for different  
10 alleged acts of wrongdoing, which infringes upon the Due Process and Equal Protection  
11 Clauses of the Fourteenth Amendment to the United States Constitution;

12 c. the procedures pursuant to which punitive damages are awarded fail to  
13 provide a reasonable limit on the amount of the award against defendant, which thereby  
14 violates the Due Process Clause of the Fourteenth Amendment to the United States  
15 Constitution;

16 d. the procedures pursuant to which punitive damages are awarded fail to  
17 provide specific standards for the amount of the award of punitive damages which  
18 thereby violates the Due Process Clause of the Fourteenth Amendment to the United  
19 States Constitution;

20 e. the procedures pursuant to which punitive damages are awarded result in  
21 the imposition of different penalties for the same or similar acts, and thus violate the  
22 Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

23 f. the procedures pursuant to which punitive damages are awarded permit the  
24 imposition of punitive damages in excess of the maximum criminal fine for the same or  
25 similar conduct, which thereby infringes upon the Due Process Clause of the Fifth and  
26 Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment  
27 to the United States Constitution;  
28

1 g. the procedures pursuant to which punitive damages are awarded permit the  
2 imposition of excessive fines in violation of the Eighth Amendment to the United States  
3 Constitution;

4 h. the award of punitive damages to Plaintiffs in this action would constitute a  
5 deprivation of property without due process of law; and

6 i. the procedures pursuant to which punitive damages are awarded permit the  
7 imposition of an excessive fine and penalty

8 **TWENTIETH AFFIRMATIVE DEFENSE**

9 **(No Failure to Warn)**

10 Defendants at all times discharged any duty to warn through appropriate and  
11 adequate warnings in accordance with federal statutes and regulations and with the then-  
12 existing states of medical and scientific knowledge.

13 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

14 **(Failure to Plead Fraud with Particularity)**

15 Plaintiffs have failed to plead a cause of action for fraud as they have not set forth  
16 allegations of fraud with the requisite particularity.

17 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

18 **(Product Safety)**

19 At all times relevant, Avandia® was not unreasonably dangerous or defective.

20 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

21 **(Failure to Join Necessary Party)**

22 Complete relief cannot be accorded among those already parties and, in the  
23 alternative, the disposition of this action without the presence of additional, unnamed  
24 persons may result in Defendants being subject to a substantial risk of incurring double,  
25 multiple, or otherwise inconsistent obligations.

26 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

27 **(Set Off)**

28 Defendants plead as a set off any monies received by Plaintiffs and/or Plaintiffs'

1 decedents for injuries or damages attributed to the subject incident, including, but not  
2 limited to, any insurance proceeds.

3 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

4 **(Lack of Causation)**

5 Defendants assert that their conduct did not cause, proximately cause, solely  
6 cause, or solely proximately cause the injuries and/or damages alleged by Plaintiffs.

7 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

8 **(Good Faith)**

9 Defendants' acts were at all times done in good faith and without malice, with  
10 respect to each and every purported cause of action in Plaintiffs' Complaint.

11 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

12 **(Unintentional Acts)**

13 Any alleged act or omission by Defendants concerning the manufacture,  
14 distribution, marketing, and/or sale of Avandia® and/or any other conduct in relation  
15 thereto was at all times unintentional and resulted from a bona fide error notwithstanding  
16 the use of reasonable procedures adopted to avoid any such error, and Defendants made  
17 an appropriate correction, repair, replacement, or remedy to the goods once notified of  
18 the error.

19 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

20 **(Conformity with Medical Knowledge)**

21 With respect to each and every purported cause of action in Plaintiffs' Complaint,  
22 Defendants allege that the methods, standards, and techniques in the preparation of  
23 GSK's product, Avandia®, were and are in conformity with the generally recognized  
24 state of medical knowledge, common and accepted procedure in the medical field, and  
25 state of the art at the time of their preparation.

26 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

27 **(Equitable Indemnity)**

28 In the event Defendants are held liable to Plaintiffs, which liability is expressly

1 denied, and any other entity is also found liable, Defendants are entitled to a percentage  
 2 contribution of the total liability from said entity in accordance with principles of  
 3 equitable indemnity and comparative contribution.

4 **THIRTIETH AFFIRMATIVE DEFENSE**

5 **(Proposition 51)**

6 The liability of Defendants, if any, for Plaintiffs' and/or Plaintiffs' decedents' non-  
 7 economic loss must be apportioned in accordance with the provisions of California Civil  
 8 Code § 1431.2 ("Proposition 51").

9 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

10 **(Failure to Mitigate Damages)**

11 Plaintiffs' damages, if any, are barred in whole or in part by Plaintiffs' and/or  
 12 Plaintiffs' decedents' failure to mitigate such damages.

13 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

14 **(No Notice of Breach of Warranty)**

15 Plaintiffs failed to give notice of any alleged breach of warranty.

16 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

17 **(Disclaimer of Warranty)**

18 Defendants allege that any and all warranties that may form a basis for Plaintiffs'  
 19 claims for relief were adequately disclaimed as stated by Defendants.

20 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

21 **(No Reliance on Warranties)**

22 Defendants deny that Plaintiffs and/or Plaintiffs' decedents relied on any  
 23 warranties alleged in the Complaint.

24 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

25 **(Unavoidable Circumstances)**

26 The alleged injuries and/or damages of Plaintiffs and/or Plaintiffs' decedents, if  
 27 any, were the result of unavoidable circumstances that could not have been prevented by  
 28 anyone.

**THIRTY-SIXTH AFFIRMATIVE DEFENSE****(Misuse)**

If Plaintiffs' decedents sustained injuries or risk of injuries in this action, which allegations are expressly denied, the injuries or risk of injuries were solely caused by and attributable to the unintended, unreasonable, and improper use which Plaintiffs' decedents made of the product.

**THIRTY-SEVENTH AFFIRMATIVE DEFENSE****(No Strict Liability for Prescription Drugs)**

The strict liability causes of action of Plaintiffs' Complaint are subject to the limitations placed upon the doctrine of strict product liability for a purported design defect as set forth in *Brown v. Superior Court*, 44 Cal. 3d. 1049 (1988) and its progeny.

**THIRTY-EIGHTH AFFIRMATIVE DEFENSE****(*Buckman v. Plaintiffs' Legal Community*)**

To the extent Plaintiffs' claims are based on alleged misrepresentations or omissions made to the FDA, such claims are barred pursuant to *Buckman v. Plaintiffs' Legal Community*, 531 U.S. 341 (2001).

**THIRTY-NINTH AFFIRMATIVE DEFENSE****(Standing)**

Plaintiffs lack standing to bring some or all of the claims alleged in the Complaint.

**FORTIETH AFFIRMATIVE DEFENSE****(Unconstitutional Claims)**

Defendants allege that granting Plaintiffs' requested relief under California Business and Professions Code § 17200 et seq. ("BPC 17200"), and/or the Consumers Legal Remedies Act, California Civil Code § 1750 et seq. ("CLRA"), would violate Defendants' rights under the United States and California constitutions.

**FORTY-FIRST AFFIRMATIVE DEFENSE****(Adequate Remedy at Law)**

Plaintiffs' causes of action under BPC 17200 and/or the CLRA, and the remedies

1 sought there under, are barred because there is an adequate remedy at law.

2 **FORTY-SECOND AFFIRMATIVE DEFENSE**

3 **(Unjust Enrichment)**

4 Any and all BPC 17200 claims are barred, in whole or in part, on the basis that  
5 Plaintiffs would be unjustly enriched if allowed to recover damages there under.

6 **FORTY-THIRD AFFIRMATIVE DEFENSE**

7 **(Remedies for Third Parties Barred)**

8 Plaintiffs' causes of action under BPC 17200, and the remedies sought thereunder,  
9 are barred because Plaintiffs seek remedies for parties that have not been injured and  
10 there are no identifiable injured parties.

11 **FORTY-FOURTH AFFIRMATIVE DEFENSE**

12 **(Plaintiffs not Competent Party)**

13 Plaintiffs' causes of action under BPC 17200 and the remedies sought thereunder,  
14 are barred because the Complaint has not been filed by competent Plaintiffs for the  
15 benefit of injured parties.

16 **FORTY-FIFTH AFFIRMATIVE DEFENSE**

17 **(Administrative or Regulatory Schemes Bar Recovery/Abstention)**

18 Plaintiffs' causes of action under BPC 17200 and the remedies sought thereunder,  
19 are barred by the existence of a comprehensive administrative or regulatory scheme  
20 which would redress the actions complained of by Plaintiffs. This Court should dismiss  
21 or stay Plaintiffs' BPC 17200 claim in deference to this administrative or regulatory  
22 scheme.

23 **FORTY-SIXTH AFFIRMATIVE DEFENSE**

24 **(Failure to Give Preliminary Notice)**

25 Plaintiffs have failed to comply with the CLRA notice requirements of California  
26 Civil Code § 1782.



**FORTY-SEVENTH AFFIRMATIVE DEFENSE**

**(Improper Plaintiffs)**

This Complaint improperly joins multiple plaintiffs.

**FORTY-EIGHTH AFFIRMATIVE DEFENSE**

**(Choice of Law)**

(a) Plaintiffs' claims are not governed by the laws of the State of California.

(b) Defendants are entitled to the benefit of all defenses and presumptions contained in, or arising from, any rule of law or statute of any other state whose substantive law might control the action.

**FORTY-NINTH AFFIRMATIVE DEFENSE**

**(Other Defenses)**

Defendants hereby give notice that they intend to rely upon any other affirmative defenses pled by any other defendant and not pled by them in this action to the extent they do not conflict with Defendants' own affirmative defenses. Defendants reserve their right to amend their Answer to assert any additional defenses and matters in avoidance that may be disclosed during the course of additional investigation and discovery.

**JURY DEMAND**

Defendants request a trial by jury of this matter.

///

///

///

///

///

///

///

///

///

///



PRAYER FOR RELIEF

WHEREFORE, Defendants pray:

1. That the Complaint be dismissed with prejudice as to the answering Defendants and that judgment be entered in their favor;
2. For costs of suit incurred herein;
3. And for such other relief as the Court may deem just and appropriate.

Dated: March 25 2008

DRINKER BIDDLE & REATH LLP

  
DONALD F. ZIMMER, JR.  
KRISTA L. COSNER

Attorneys for Defendants  
SMITHKLINE BEECHAM  
CORPORATION dba  
GLAXOSMITHKLINE and McKESSON  
CORPORATION

**CERTIFICATE OF SERVICE**

I, LEE ANN L. ALLDRIDGE, declare that:

I am at least 18 years of age, and not a party to the above-entitled action. My business address is 50 Fremont Street, 20th Floor, San Francisco, California 94105, Telephone: (415) 591-7500.

On March 25, 2008, I caused to be served the following document(s):

**ANSWER TO COMPLAINT BY DEFENDANTS SMITHKLINE BEECHAM CORPORATION dba GLAXOSMITHKLINE; and McKESSON CORPORATION**

by enclosing a true copy of (each of) said document(s) in (an) envelope(s), addressed as follows:

☒ BY MAIL: I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by a messenger service by hand to the address(es) listed below:

☐ BY OVERNIGHT DELIVERY: I enclosed a true copy of said document(s) in a Federal Express envelope, addressed as follows:

☐ BY FACSIMILE: I caused such documents to be transmitted by facsimile transmission and mail as indicated above.

David C. Andersen  
THE MILLER FIRM, LLC  
108 Railroad Avenue  
Orange, VA 22960  
Telephone: (540) 672-4224  
Facsimile: (540) 672-3055

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 25, 2008 at San Francisco, California.

  
LEE ANN L. ALLDRIDGE

# Exhibit C

10/18/2007 16:21 FAX 2025021

JPML

14002

**MDL 1871**UNITED STATES  
JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

7:23 am, Oct 16, 2007

FILED  
CLERK'S OFFICEUNITED STATES JUDICIAL PANEL  
ON  
MULTIDISTRICT LITIGATIONIN RE: AVANDIA MARKETING, SALES PRACTICES  
AND PRODUCTS LIABILITY LITIGATION

Sharon Ann Dabon v. GlaxoSmithKline, Inc., )

E.D. Louisiana, C.A. No. 2:07-3041 )

Celenio Cruz-Santana v. GlaxoSmithKline, PLC, et al., )

D. Puerto Rico, C.A. No. 3:07-1461 )

MDL No. 1871

## TRANSFER ORDER

Before the entire Panel<sup>1</sup>: Plaintiff in the action pending in the Eastern District of Louisiana, has moved, pursuant to 28 U.S.C. § 1407, to centralize this litigation in the District of Puerto Rico or, alternatively, in the Eastern District of Louisiana. This litigation currently consists of moving plaintiff's action and one action pending in the District of Puerto Rico.<sup>1</sup> Plaintiff in the latter action supports centralization in the District of Puerto Rico. Plaintiffs in potential tag-along actions pending in the Central District of California, the Southern District of Florida, the District of New Jersey, the Southern District of New York, and the District of Puerto Rico have submitted responses in support of centralization. These plaintiffs suggest a variety of fora for transferee district, including the Southern District of Florida (favored by plaintiffs in the action pending in that district), the District of New Jersey (favored by plaintiff in the action pending in that district, as well as plaintiff in the Central District of California action), the Southern District of New York (favored by plaintiffs in eight actions pending in that district), and the District of Puerto Rico (favored by plaintiffs in the action pending in that district). Responding defendant SmithKlineBeecham Corp. d/b/a GlaxoSmithKline (GSK) initially opposed the Section 1407 motion, but now supports centralization in the Eastern District of Pennsylvania.

\* Judge Heyburn took no part in the disposition of this matter.

<sup>1</sup> The Panel has been notified of 28 additional related actions pending in the Western District of Arkansas, the Central District of California (two actions), the Southern District of Florida (two actions), the Southern District of Illinois, the Southern District of Indiana, the Eastern District of Louisiana, the District of New Jersey, the Eastern District of New York, the Southern District of New York (ten actions), the Northern District of Ohio, the Eastern District of Oklahoma, the Eastern District of Pennsylvania, the District of Puerto Rico, the Eastern District of Tennessee, the Western District of Tennessee, and the Eastern District of Texas (two actions). These actions and any other related actions will be treated as potential tag-along actions. See Rules 7.4 and 7.5, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001).

OFFICIAL FILE COPY

IMAGED OCT 16 2007

PLEADING NO. 22

10/18/2007 16:21 FAX 202502

JPML

003

- 2 -

On the basis of the papers filed and hearing session held, we find that these actions involve common questions of fact, and that centralization under Section 1407 in the Eastern District of Pennsylvania will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Both actions arise from allegations that certain diabetes drugs manufactured by GSK – Avandia and/or two sister drugs containing Avandia (Avandamet and Avandaryl) – cause an increased risk of heart attack and other physical injury, and that GSK failed to provide adequate warnings concerning that risk. Centralization under Section 1407 will eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.

We are also persuaded that the Eastern District of Pennsylvania is an appropriate transferee district for pretrial proceedings in this litigation. GSK's principal place of business is located in that district, and thus many witnesses and documents relevant to the litigation are likely to be found there. In addition, one of the potential tag-along actions was commenced in the Eastern District of Pennsylvania.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the two actions are transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable Cynthia M. Rufe for coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



D. Lowell Jensen  
Acting Chairman

John G. Heyburn II, Chairman\*  
Robert L. Miller, Jr.  
David R. Hansen

J. Frederick Motz  
Kathryn H. Vratil  
Anthony J. Scirica

# Exhibit D

1 DONALD F. ZIMMER, JR. (State Bar No. 112279)  
2 KRISTA L. COSNER (State Bar No. 213338)  
3 DRINKER BIDDLE & REATH LLP  
4 50 Fremont Street, 20<sup>th</sup> Floor  
5 San Francisco, California 94105  
6 Telephone: (415) 591-7500  
7 Facsimile: (415) 591-7510

8 Attorneys for Defendants  
9 SMITHKLINE BEECHAM CORPORATION dba  
10 GLAXOSMITHKLINE and McKESSON  
11 CORPORATION

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15 DOROTHY BONE; DAVID COOK;  
16 JESUS COTA; JO ELLEN GARNER;  
17 BARRON GATTA; CATHY GRAY;  
18 FRANKLIN JENKINS; GREGORY  
19 RODRIGUEZ; ROBERT RODRIGUEZ;  
20 ROGER TAVARES; LAVIOLA  
21 TOWNSEND,

22 Plaintiffs,

23 v.

24 SMITHKLINE BEECHAM  
25 CORPORATION dba  
26 GLAXOSMITHKLINE and McKESSON  
27 CORPORATION,

28 Defendants.

Case No.

**DECLARATION OF GREG YONKO IN  
SUPPORT OF NOTICE OF REMOVAL  
AND REMOVAL ACTION, UNDER 28  
U.S.C. § 1441(B) (DIVERSITY) and 28  
U.S.C. § 1441(C) (FEDERAL  
QUESTION) OF DEFENDANT  
SMITHKLINE BEECHAM  
CORPORATION dba  
GLAXOSMITHKLINE**

I, GREG YONKO, declare:

1. I am Senior Vice President - Purchasing for McKesson Corporation  
("McKesson"), and make this declaration in support of the Notice of Removal and  
Removal Action of defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline  
("GSK") based on my personal knowledge.

2. I have been in my current position since 1997, and have been employed by  
McKesson for over 25 years. As Vice President of Purchasing, I am responsible for



1 purchasing prescription and non-prescription branded product management and  
2 investment purchasing.

3 3. McKesson was and is a Delaware corporation, with its principal place of  
4 business in San Francisco, California.

5 4. McKesson was served with the Summons and Complaint in this action on  
6 October 24, 2007.

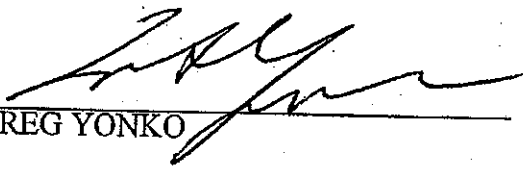
7 5. McKesson consents to the removal of this action.

8 6. McKesson is a wholesale distributor of pharmaceuticals, over-the-counter  
9 and health and beauty products to chains, independent pharmacy customers and hospitals.  
10 As a wholesale distributor, McKesson distributes products manufactured by others. As to  
11 Avandia®, McKesson does not manufacture, produce, process, test, encapsulate, label, or  
12 package, these products, nor does it make any representations or warranties as to the  
13 product's safety or efficacy.

14 7. McKesson distributed Avandia®, manufactured by GSK, along with many  
15 other products of other pharmaceutical companies, to certain drug stores, pharmacies,  
16 health care facilities and hospitals throughout the United States. As stated above,  
17 McKesson did not manufacture, produce, process, test, encapsulate, label, or package  
18 Avandia®, but only delivered the unopened boxes that contained the drug.

19 8. McKesson is one of many suppliers who could have supplied Avandia® to  
20 the numerous pharmacies throughout the United States.

21 I declare under penalty of perjury under the laws of the State of California that the  
22 foregoing is true and correct, and this declaration was executed on November 16, 2007 in  
23 San Francisco, California.

24  
25   
26 GREG YONKO  
27  
28